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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ESAU ROGERS, Plaintiff, **v.** **S. RIVAS, et al.,** Defendants.	07-CV-02010 W-JMA **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND TO STRIKE** [Fed. R. Civ. P. 12(b), 12 (b)(1), 12(b)(6), 12(f)] Hearing: June 26, 2008 Time: 9:00 a.m. Courtroom: D Judge: The Honorable Jan M. Adler **No Oral Argument Required Per Court**

TABLE OF CONTENTS

	Page
INTRODUCTION	2
GROUNDS FOR MOTION	2
PLAINTIFF'S ALLEGATIONS	3
LEGAL STANDARD FOR MOTION TO DISMISS	4
ARGUMENT	5
I. ALL NAMED DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY WHERE SUED IN THEIR OFFICIAL CAPACITY	5
II. THE COMPLAINT SHOULD BE DISMISSED AGAINST ALL DEFENDANTS EXCEPT RIVAS FOR PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AGAINST THEM	5
A. Standard	5
B. Rule Of Exhaustion	6
C. The California System	7
D. Discussion – Plaintiff Did Not Exhaust Administrative Remedies against Most Defendants.	8
III. PLAINTIFF CANNOT STATE ANY COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANTS BATCHELOR, DEGEUS, HERNANDEZ, SOUKUP AND STEIN BASED ON THEIR ROLES IN PROCESSING HIS ADMINISTRATIVE APPEAL	8
IV. PLAINTIFF CANNOT STATE A COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANT ALMAGER BASED ON A THEORY OF RESPONDEAT SUPERIOR LIABILITY	10
V. PLAINTIFF FAILS TO STATE ANY COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANT RIVAS	11
A. Plaintiff Fails to State a Cognizable First Amendment Retaliation Claim against Rivas.	11

TABLE OF CONTENTS (continued)

Page

1. Plaintiff Fails to Allege Facts Sufficient to Satisfy the Element of Causation. 11

2. Plaintiff Fails to Allege Facts Showing Defendant Rivas Lacked a Legitimate Correctional Purpose in Conducting the Disputed Cell Search, And the Documents He Has Incorporated into His Complaint Bar Him from Doing so. 12

B. Plaintiff Fails to State a Cognizable Eighth Amendment Claim against Rivas. 13

C. Plaintiff Fails to State a Cognizable Due Process Claim against Rivas. 15

VI. ALL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AGAINST PLAINTIFF'S CLAIMS 15

VII. PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES MUST BE STRICKEN 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Creighton
483 U.S. 635 (1987) 16

Arnold v. Intern. Business Machines
637 F.2d 1350 (9th Cir. 1981) 11

Balistreri v. Pacifica Police Department
901 F.2d 696 (9th Cir. 1988) 4

Barnett v. Centoni
31 F.3d 813 (9th Cir. 1994) 11, 15

Behrens v. Pelletier
516 U.S. 299 (1996) 15

Bell Atlantic Corp. v. Twombly
127 S.Ct. 1955 (2007) 4

Bennett v. King
293 F.3d 1096 (9th Cir. 2002) 6

Berquist v. County of Cochise
806 F.2d 1364 (9th Cir. 1986) 11

Booth v. Churner
532 U.S. 731 (2001) 6

Bruns v. NCUA
122 F.3d 1251 (9th Cir. 1997) 4

Buckley v. Barlow
997 F.2d 494 (8th Cir. 1993) 9

Bureerong v. Uvawas
922 F. Supp. 1450 (N.D. Cal. 1996) 16

Clegg v. Cult Awareness Network
18 F.3d 752 (9th Cir.1994) 4

Davis v. Scherer
468 U.S. 183 (1984) 16

Dennis v. Thurman
959 F. Supp. 1253 (C.D. Cal. 1997) 10

Dittman v. California
191 F.3d 1020 (9th Cir. 1999) 5

DM Research, Inc. v. College of American Pathologists
170 F.3d 53 (1st Cir. 1999) 4

TABLE OF AUTHORITIES (continued)

	Page
Durning v. First Boston Corp. 815 F.2d 1265 (9th Cir. 1987) cert. denied, 484 U.S. 944 (1987)	12
Estate of Brooks v. United States 197 F.3d 1245 (9th Cir. 1999)	9
Estelle v. Gamble 429 U.S. 97 (1976)	14
Farmer v. Brennan 511 U.S. 825 (1994)	11
Galbraith v. County of Santa Clara 307 F.3d 1119 (9th Cir. 2002)	4
Gaut v. Sunn 810 F.2d 923 (9th Cir. 1987)	14, 15
Harlow v. Fitzgerald 457 U.S. 800 (1982)	15
Henry v. County of Shasta 132 F.3d 512 (9th Cir. 1997)	5
Hudson v. Palmer 468 U.S. 517 (1984)	14, 15
Inlandboatmen's Union of the Pacific v. Dutra Group 279 F.3d 1075 (9th Cir. 2002)	6
Ivey v. Board of Regents 673 F.2d 266 (9th Cir. 1982)	4
Karim-Panahi v. Los Angeles Police Department 839 F.2d 621 (9th Cir. 1988)	4
Keenan v. Hall 83 F.3d 1083 (9th Cir. 1996)	15
King v. Atiyeh 814 F.2d 565 (9th Cir. 1987)	10
Leer v. Murphy 844 F.2d 628 (9th Cir. 1988)	9-11
Lopez v. Smith 203 F.3d 1122 (9th Cir. 2000)	13, 15, 18
Madrid v. Gomez 190 F. 3d 990 (9th Cir. 1999)	7

TABLE OF AUTHORITIES (continued)

	Page
Mann v. Adams 855 F.2d 639 (9th Cir. 1988)	9
Massey v. Helman 259 F.3d 641 (7th Cir. 2001)	9
McKinney v. Carey 311 F.3d 1198 (9th Cir. 2002)	6
Oltarzewski v. Ruggiero 830 F.2d 136 (9th Cir. 1987)	15
Ott v. Home Savings & Loan Ass'n 265 F.2d 643 (9th Cir. 1958)	12
Palmer v. Sanderson 9 F.3d 1433 (9th Cir. 1993)	11
Porter v. Nussle 534 U.S. 516 (2002)	6
Ramirez v. Galaza 334 F.3d 850 (9th Cir. 2003)	9
Redman v. County of San Diego 942 F.2d 1435 (9th Cir. 1991)	10
Regents of the University of California v. Doe 519 U.S. 425 117 S. Ct. 900 (1997)	5
Resnick v. Hayes 213 F.3d 443 (9th Cir. 2000)	11
Rhodes v. Robinson 408 F.3d 559 (9th Cir. 2005)	11, 12
Ritza v. International Longshoremen's and Warehousman's Union 837 F.2d 365 (9th Cir. 1988)	6
Rizzo v. Goode 423 U.S. 362 (1996)	10
Roth v. Garcia Marquez 942 F.2d 617 (9th Cir. 1991)	12, 14
Saucier v. Katz 533 U.S. 194 (2001)	16
Shehee v. Luttrell 199 F.3d 295 (6th Cir. 1999)	10

TABLE OF AUTHORITIES (continued)

	Page
Smith v. Wade 461 U.S. 30 (1983)	16, 17
Somers v. Thurman 109 F.3d 614 (9th Cir. 1997) *cert. denied*, 522 U.S. 852 (1997)	15
Swierkiewicz v. Sorema 534 U.S. 506 (2002)	4
Tapley v. Lockwood Green Engineers, Inc. 502 F.2d 559 (8th Cir. 1974)	16
Vaden v. Summerhill 449 F.3d 1047 (9th Cir. 2006)	6, 7
Vigliotto v. Terry 873 F.2d 1201 (9th Cir. 1989)	14
Ward v. City of San Jose 967 F.2d 280 (9th Cir. 1991)	17
Woodford v. Ngo 541 U.S. 81 (2006)	7, 8
Wulf v. City of Wichita 883 F.2d 842 (10th Cir. 1989)	17
Wyatt v. Terhune 315 F.3d 1108 (9th Cir. 2003)	6
Constitutional Provisions	
42 United States Code	
§ 1983	2, 9-11, 15-17
§ 1997e(a)	6
United States Constitution	
First Amendment	3, 11, 18
Eighth Amendment	3, 13-15, 18
Eleventh Amendment	2, 5
Fourteenth Amendment	3, 15, 18
Statutes	
California Code Regulations, Title 15	
§ 3084.1(a)	7
§ 3084.5.	7
§ 3084.7(c)	7, 8
California Government Code	
§§ 810-895	15

TABLE OF AUTHORITIES (continued)

	Page
Federal Rules of Civil Procedure	
Rule 8(a)	4
Rule 12(b)	2, 5, 6
Rule 12(b)(1)	2, 4
Rule 12(b)(6)	2, 4, 18
Rule 12(f)	2, 3, 16
Other Authorities	
California Department of Corrections Operations Manual § 54100.11	7
California Tort Claims Act	15

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Defendants Almager, Batchelor, DeGeus, Hernandez, Rivas, Soukup and Stein respectfully submit the following memorandum of points and authorities in support of their Motion to Dismiss the Complaint of Plaintiff Esau Rogers for his failure to exhaust administrative remedies prior to filing suit, as required by the Prison Litigation Reform Act (PLRA), and failure to state a

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claim against the Defendants (Fed. R. Civ. P. rules 12(b), 12(b)(6)); and their Motion to Strike Plaintiff's request for punitive damages (Fed. R. Civ. P. 12(f)).

INTRODUCTION

Plaintiff Esau Rogers is a California prisoner currently incarcerated at Centinela State Prison. Proceeding *pro se* and *in forma pauperis*, Plaintiff filed this lawsuit on October 17, 2007, protesting events alleged to have occurred at Centinela on December 1, 2006, January 30, 2007, and March 15, 2007. (Compl. 1 of 22.) Essentially, Plaintiff alleges Defendant Rivas retaliated against him for past inmate appeals he filed against her by conducting a punitive search of his prison cell on December 1, 2006. Plaintiff appears to be charging Defendant Almager, the Acting Warden at Centinela, with participation in this incident based on a theory of respondeat superior liability. Plaintiff appears to be charging the balance of the Defendants with liability based on their involvement in processing or investigating his inmate appeal against Defendant Rivas. All Defendants were employed at Centinela during the period of time alleged in the Complaint.

Plaintiff brings this action under 42 U.S.C. § 1983. He sues all Defendants in their official and individual capacities, and seeks general damages in the amount of $350,000 from each Defendant, punitive damages in the amount of $650,000 from each Defendant, and compensatory damages "to cover undue stress and mental anguish from each defendant." (Compl. 10 of 22.) Plaintiff also seeks injunctive relief preventing Defendant Rivas from engaging in any act of alleged retaliation, and that she be monitored by the Court and supervisory staff.

GROUNDS FOR MOTION

Defendants move to dismiss on the following grounds: (1) All Defendants move to dismiss Plaintiff's Complaint filed against them in their official capacities, pursuant to Federal Rule of Civil Procedure 12(b)(1), as each of them is immune to suit for money damages in federal court under the Eleventh Amendment; (2) All Defendants except Rivas move to dismiss under Federal Rule of Civil Procedure 12(b), on the nonenumerated ground that Plaintiff failed to exhaust administrative remedies against them before filing this action; (3) All Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(6), on the ground that the Complaint fails to state facts sufficient to support any cognizable claim against any of them; (4) All Defendants move to dismiss on the ground they are entitled to qualified immunity; and, (5) All Defendants move to strike Plaintiff's request for punitive damages under Federal Rule of Civil Procedure 12(f), as Plaintiff has failed to provide anything other than conclusory allegations to show any of them acted with an evil motive.

PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that at some unidentified time prior to December 1, 2006, he filed one or more administrative appeals against Defendant Rivas. Next, Plaintiff alleges that on December 1, 2006, Defendant Rivas conducted an unjustified search of his prison cell, and left his personal property strewn about the cell, all in retaliation for those prior administrative appeals. (Compl. 4 of 22.) Plaintiff further alleges that when he asked Defendant Rivas about the cell search, she responded defiantly and with profanities. Plaintiff includes, as part of the exhibit attached to his Complaint, a Cell Search Log from his housing unit, as well as a Cell Search Receipt, dated December 1, 2006, and signed by Correctional Officers Rivas and Corfman. (Compl., 13 and 14 of 22.)

Plaintiff continues with a recitation of the steps that he took in exhausting his December 1, 2006, inmate appeal against Defendant Rivas. At paragraph 10 of his Complaint, Plaintiff accuses Defendants Stein, Hernandez, DeGues, and Soulkup of violating his Eighth Amendment rights in somehow subjecting him to harassment and retaliation. Plaintiff does not clearly indicate what these Defendants did to violate his rights, and it appears from the totality of Plaintiff's accusations he is suing these Defendants for their respective roles in processing or responding to his administrative grievance against Defendant Rivas. (Compl. 5 of 22.) Later, at paragraph 23 of the Complaint, Plaintiff mentions these secondary Defendants again, along with Defendant Almager, and accuses them, in conclusory terms, of acting in a conspiracy to deprive Plaintiff of his constitutional rights under the First, Eighth, and Fourteenth Amendments. (Compl. 8 of 22.) Plaintiff seeks to hold Defendant Almager liable for his complaints in that Almager is "responsible for the day-to-day operation [of Centinela State Prison]...he is

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responsible for the daily operation of the entire prison, and for the welfare of all the inmates of the prison, including Plaintiff." (Compl. 3 of 22.)

LEGAL STANDARD FOR MOTION TO DISMISS

Defendants move to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A pleading fails to state a claim upon which relief can be granted where Plaintiff does not have a cognizable legal theory, or fails to plead sufficient facts to support a cognizable theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1988). In evaluating a pleading, the Court may rely on well-pleaded facts and reasonable inferences therefrom, and may interpret the facts and inferences in a manner favorable to Plaintiff. *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir. 1988). Although the heightened pleading standard no longer applies to prisoner civil rights actions (*Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)), the requirements of Federal Rule of Civil Procedure, rule 8(a) still apply. *Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."). Under Rule 8, bald assertions and legal conclusions are not sufficient; "the factual allegations must be specific enough to justify dragging a defendant past the pleading threshold." *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999) (internal quotation marks and citations omitted).

In *Bruns v. NCUA*, 122 F.3d 1251, 1257 (9th Cir. 1997), the Court stated that "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled. Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Id.* (citing *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)). Additionally, courts "are not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994). In short, the absence of a heightened pleading standard does not relieve Plaintiff of his obligation to come forward with adequate factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007).

ARGUMENT

I.

ALL NAMED DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY WHERE SUED IN THEIR OFFICIAL CAPACITY

Plaintiff has sued the Defendants in their official capacities. (Compl. 2 and 3 of 22.) However, they are entitled to sovereign immunity in a federal lawsuit if sued in their official capacity. It is well established that neither a state nor a state officer can be sued for damages in their official capacity in federal court. "The Eleventh Amendment immunizes states from private damage actions brought in federal court." *Henry v. County of Shasta*, 132 F.3d 512, 517 (9th Cir. 1997). Likewise, a suit for damages against a state official in his official capacity is barred by the Eleventh Amendment. *Regents of the University of California v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 903 (1997); *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999). It makes no difference whether the Defendants are individually named in their official capacity, as opposed to the State of California being named: "Thus, 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Regents of the Univ. of Cal.*, 519 U.S. at 429 (quoting *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). In his prayer, Plaintiff seeks monetary relief. (Compl. 10 of 22.) Plaintiff's complaint specifies that these damages are sought against all Defendants in their official capacities. This Court, however, lacks jurisdiction to hear monetary claims against state officials in their official capacities. Accordingly, Plaintiff's claims against Defendants in their official capacities must be dismissed.

II.

THE COMPLAINT SHOULD BE DISMISSED AGAINST ALL DEFENDANTS EXCEPT RIVAS FOR PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AGAINST THEM

A. Standard

All Defendants, except Rivas, move for dismissal under Federal Rule of Civil Procedure 12(b), on the non-enumerated ground that Plaintiff failed to exhaust administrative remedies before filing this action. *See Ritza v. International Longshoremen's and Warehousman's Union*, 837 F.2d 365, 368-69 (9th Cir. 1988); *Inlandboatmen's Union of the Pacific v. Dutra Group*, 279 F.3d 1075, 1078 n.2 (9th Cir. 2002); *Vaden v. Summerhill*, 449 F.3d 1047 (9th Cir. 2006).

In *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), the Court of Appeals held the proper pretrial vehicle for challenging and establishing an inmate's failure to comply with the Prison Litigation Reform Act's (PLRA) exhaustion requirement is to file "an unenumerated Rule 12(b) motion rather than a motion for summary judgment." *Id.* at 1119. "In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." *Id.* at 1119-20.

B. Rule Of Exhaustion

The rule requiring a prisoner to exhaust administrative remedies before filing suit is set forth in 42 U.S.C. § 1997e(a):

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Compliance with § 1997e(a) is mandatory:

> Once within the discretion of the district court, exhausting in cases covered by § 1997e(a) is now mandatory. *Booth v. Churner*, 532 U.S. 731, 739 (2001). All "available" remedies must now be exhausted; those remedies need not meet federal standards, nor must they be "plain, speedy, and effective." [¶] [W]e hold that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.

Porter v. Nussle, 534 U.S. 516, 524 (2002); *see also Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002); *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

As the Supreme Court explained in *Booth*, when Congress amended section 1997e(a) in 1995, "the amendments eliminated . . . the discretion to dispense with administrative exhaustion." *Booth v. Churner*, 532 U.S. 731, 739 (2001). The Court also "stress[ed] the point . . . that [it] will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6. "This inference is, to say the least, also consistent with Congress's elimination of the requirement that administrative procedures must satisfy certain 'minimum acceptable standards' of fairness and effectiveness before inmates can be required to exhaust them, and the elimination of the courts' discretion to excuse exhaustion when it would not be 'appropriate and in the interests of justice.'" *Id.* at 740 n.5. Indeed, in enacting the PLRA, Congress sought "to curtail frivolous prisoners' suits and to minimize the costs - which are borne by taxpayers – associated with those suits," interests both legitimate and consistent with rational basis analysis, the least restrictive test for constitutional validity. *Madrid v. Gomez*, 190 F. 3d 990, 996 (9th Cir. 1999).

The United States Supreme Court clarified the exhaustion requirement under the PLRA in *Woodford v. Ngo*, 541 U.S. 81 (2006). In *Woodford*, the United States Supreme Court reversed the Ninth Circuit Court of Appeals and held that an inmate must properly exhaust administrative remedies, including complying with the administrative time requirements, before the inmate can file suit. Simply put, *Woodford* holds that inmates who fail to timely comply with the prison's administrative grievance procedures and complete every step in the administrative appeal process are barred from suing on their civil rights claims. *Id.* at 95-96.

C. The California System

The administrative appeal system for California inmates is described in Title 15 of the California Code of Regulations. Inmates may "appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). The administrative appeal must be submitted within fifteen working days of the event or decision being grieved. Cal. Code Regs. tit. 15, § 3084.7(c). An inmate wishing to exhaust his or her remedies must complete four steps: (1) attempted informal resolution, (2) first formal level appeal, (3) second formal level appeal, and (4) third, or director's, level appeal. Cal. Code Regs. tit. 15, § 3084.5. The administrative process is completed, or exhausted, only after the inmate receives a decision from the Director. Cal. Dep't of Corrections Operations Manual, § 54100.11 ("Levels of Review"); *Woodford,* 126 S. Ct. at 2378; *and see Vaden*, 449 F.3d at 1051 (holding a complaint must be dismissed where it is

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submitted by a prisoner for filing with the court before administrative remedies are *completely* exhausted, even if the claims become fully exhausted after the complaint is filed.)

D. Discussion – Plaintiff Did Not Exhaust Administrative Remedies against Most Defendants.

It is clear that Plaintiff exhausted administrative remedies with respect to his allegations against Defendant Rivas. He did so in inmate appeal number CEN-06-01165. (Decl. Grannis ¶ 6(b).) However, in this administrative appeal, Plaintiff did not mention anything about the alleged misconduct of any other prison official, including the balance of the Defendants he has named in this lawsuit. (Decl. Grannis ¶ 6(b), *and see* Exhibit A to Grannis Decl., the full reproduction of CEN-06-01165, and all responses to it; *see also* Decl. DeGues ¶ 6(i)) Also, Plaintiff did not file any other administrative appeal naming any of these Defendants, or grieving any of the misconduct he now attributes to them. (Decl. Grannis ¶ 9, Decl. DesGues ¶ 8.)

Thus, it is clear that Plaintiff did not exhaust administrative remedies against the balance of the Defendants he has sued in this case. Prison officials were never placed on notice of any grievance Plaintiff had against these Defendants before this lawsuit was filed. For this reason, his Complaint against them should be dismissed. Moreover, this dismissal should be made without leave to amend, because Plaintiff cannot now exhaust claims against the remaining Defendants based on conduct he attributes to them from 2007. With respect to these Defendants, Plaintiff is in a state of incurable procedural default. *See* Cal. Code Regs. tit. 15, § 3084.7(c) (requiring prison inmates to submit an administrative appeal within fifteen working days of the event or decision being appealed) *and see Woodford,* 548 U.S. at 94-95 (holding inmates who fail to *timely* comply with the prison's administrative grievance procedures are barred from suing on their civil rights claims).

III.

PLAINTIFF CANNOT STATE ANY COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANTS BATCHELOR, DEGEUS, HERNANDEZ, SOUKUP AND STEIN BASED ON THEIR ROLES IN PROCESSING HIS ADMINISTRATIVE APPEAL

Plaintiff's allegations against Defendants Batchelor, DeGues, Hernandez, Soukup, and Stein rest solely on their respective roles in processing his administrative grievance against Defendant Rivas, which was classified and treated as a staff complaint. While this is not immediately clear, one can surmise it from the fact that Plaintiff fails to allege any other basis of liability against these Defendants, and from a perusal of the administrative appeal responses he attached to the Complaint. *See* Staff Complaint Response, dated January 3, 2007, endorsed by Defendant Hernandez (Compl. 16 of 22); Second Level Appeal Response, dated March 16, 2007, endorsed by Defendant Soukup on behalf of Acting Warden Almager (Compl. 18 and 19 of 22); and the naming of Defendants Batchelor, DeGues, and Stein elsewhere in the appeal response paperwork. But there is no constitutional right to an inmate grievance system. Therefore, liability under 42 U.S.C. section 1983 cannot be predicated upon a defendant's involvement in the inmate grievance system. As the Eighth Circuit has held:

> We conclude [that the inmate's] first complaint failed to state a claim because no constitutional right was violated by the defendants' failure, if any, to process all of the grievances he submitted for consideration. A prison grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment. Thus defendants' failure to process any of [the inmate's] grievances, without more, is not actionable under section 1983.

Buckley v. Barlow, 997 F.2d 494, 497 (8th Cir. 1993) (internal citations and quotation marks omitted); *see also, Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) ("There is no legitimate claim to entitlement to a grievance procedure."); *Ramirez v. Galaza*, 334 F.3d 850 (9th Cir. 2003) ("Ramirez's claimed loss of a liberty interest in the processing of his appeals does not satisfy this standard, because inmates lack a separate constitutional entitlement to a specific prison grievance procedure.") (*citing Mann*, 855 F.2d at 640); and *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001) ("The courts of appeals that have confronted this issue are in agreement that the existence of a prison grievance procedure confers no liberty interest on a prisoner.").

Further, the Civil Rights Act provides for relief only against those who, through their personal involvement or failure to perform legally required duties, caused the deprivation of another's constitutionally protected rights. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Estate of Brooks v. United* States, 197 F.3d 1245, 1248 (9th Cir. 1999) ("Causation is, of course, a required element of a § 1983 claim."). State officials are subject to suit only if "they play an *affirmative part* in the alleged deprivation of constitutional rights." *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987) (emphasis added). "The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer*, 844 F.2d at 633 (citing *Rizzo v. Goode*, 423 U.S. 362, 370-371 (1996)). Where a prison official's only involvement in the allegedly unlawful conduct is the denial of an administrative grievance, the causation element required to sustain a § 1983 claim is lacking. *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (finding no liability where only allegation is denial of inmate's grievance). From these authorities, it is clear Plaintiff cannot predicate any constitutional claim against Defendants Batchelor, DeGues, Hernandez, Soukup, and Stein based on their roles in processing his staff complaint against Defendant Rivas. For this reason, Plaintiff's theory of liability against these Defendants is fundamentally flawed, and his Complaint against them should be dismissed with prejudice and without leave to amend, apart from his failure to exhaust administrative remedies against them.

IV.

PLAINTIFF CANNOT STATE A COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANT ALMAGER BASED ON A THEORY OF RESPONDEAT SUPERIOR LIABILITY

Plaintiff's sole theory of liability against Defendant Almager is one of respondeat superior liability, charging Almager with responsibility for "the daily operation of the entire prison . . .." (Compl. 3 of 22.) But a supervisory official may be liable under 42 U.S.C. § 1983 only if he was personally involved in the constitutional deprivation, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Dennis v. Thurman*, 959 F. Supp. 1253, 1261 (C.D. Cal. 1997) (citing *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991)). Supervisory defendants may be liable if the alleged deprivation resulted from their failure to properly train or supervise personnel, or from a policy or custom for which the defendant was responsible. *Id.* A sufficient causal connection must be established by showing that the supervisor set in motion a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict the injury. *Id.*

(citing *Berquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986)). *Respondeat superior* is therefore an insufficient basis for liability under Section 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

A state official can only be liable under Section 1983 "if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains]." *Leer*, 844 F.2d at 633 (emphasis added). The causation requirement for Section 1983 is not satisfied by a showing of mere causation in fact. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981). Rather, the plaintiff must establish proximate or legal causation. *Id.* Thus, Plaintiff has no Section 1983 claim against Defendant Almager because there are no factual allegations showing Almager was personally involved in any alleged constitutional deprivation, nor could there be based on the scenario Plaintiff presents. Plaintiff's claim against Almager is fundamentally flawed, and should be dismissed with prejudice and without leave to amend, apart from Plaintiff's failure to exhaust administrative remedies against him.

V.

PLAINTIFF FAILS TO STATE ANY COGNIZABLE CLAIM FOR RELIEF AGAINST DEFENDANT RIVAS

A. Plaintiff Fails to State a Cognizable First Amendment Retaliation Claim against Rivas.

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson* 408 F.3d 559, 567-68 (9th Cir. 2005) (citing *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000), *Barnett v. Centoni* 31 F.3d 813, 815-16 (9th Cir. 1994)).

1. Plaintiff Fails to Allege Facts Sufficient to Satisfy the Element of Causation.

To state a viable retaliation claim, Plaintiff must supply non-conclusory allegations demonstrating a *causal relationship* between Defendant Rivas's search of his prison cell on December 1, 2006, and some prior administrative grievance he filed against her. Causation is a necessary element of a retaliation claim. *Rhodes*, 408 F.3d at 567. Although Plaintiff alleges that Defendant Rivas cursed at him and ridiculed him when he questioned her about the cell search, Plaintiff does not allege any causal connection between Rivas's conduct and some prior administrative grievance. Because Plaintiff's allegations are insufficient to show the necessary causal relationship, he fails to state a cognizable retaliation claim.

2. Plaintiff Fails to Allege Facts Showing Defendant Rivas Lacked a Legitimate Correctional Purpose in Conducting the Disputed Cell Search, And the Documents He Has Incorporated into His Complaint Bar Him from Doing so.

To advance a viable retaliation claim, Plaintiff must allege facts sufficient to show Defendant Rivas lacked a legitimate correctional purpose in searching his prison cell on December 1, 2006. *Rhodes*, 408 F.3d at 568. But Plaintiff fails to provide anything other than conclusory allegations to satisfy this requirement. Instead, Plaintiff references documents he attached to his Complaint. Plaintiff attached a Cell Search Receipt, dated December 1, 2006, and signed by Defendant Rivas and Correctional Officer Corfman. (Compl. 14 of 22.) Plaintiff also attached a Cell Search Log, endorsed by Officers Rivas and Corfman on December 1, 2006, and including other entries regarding prior searches of Plaintiff's cell. (Compl. 13 of 22.)

In attaching these documents to his Complaint, Plaintiff has made them part of his pleading, and the Court may consider them in evaluating the allegations in the Complaint in deciding this motion to dismiss. The Court of Appeals has indicated, "if a complaint is accompanied by attached documents, *the court is not limited by the allegations contained in the complaint.* These documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991) (citations and internal punctuation omitted, emphasis added); *see also Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied, 484 U.S. 944 (1987) (internal citations omitted). When the allegations of a complaint are refuted by an attached document, the Court need not accept the allegations as being true. *Roth*, at 625 n.1 (citing *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 646 n. 1 (9th Cir. 1958)).

Here, what conclusory allegations Plaintiff provides concerning Rivas's alleged lack of a legitimate correctional purpose in searching his prison cell on December 1, 2006, are contradicted by the Cell Search Receipt and the Cell Search Log. The Cell Search Receipt, dated December 1, 2006, reveals that Defendant Rivas and Officer Corfman searched Plaintiff's cell because the cell window was covered (an explicit violation of prison regulations, as indicated on the form), the cell contained excess property, the cell had unauthorized electrical wiring, the cell had an excessive amount of combustibles, the cell had unauthorized electrical devices, the cell had excessive clothing, the cell had excessive linen, the floor was dirty, the toilet was dirty, the washbasin was dirty, and there was an accumulation of trash. The Cell Search Receipt also reveals the overall condition of the cell was "unsatisfactory." (Compl. 14 of 22.) Each and every one of these notations shows Rivas had a legitimate correctional purpose in searching Plaintiff's cell.

Likewise, the Cell Search Log reveals that Plaintiff's cell was searched four times in the six months preceding the disputed cell search, with two of the previous searches involving Defendant Rivas, and two not. Also, the two searches immediately preceding the disputed cell search (October 20, 2006, and September 1, 2006) did not involve Defendant Rivas, but did involve problems and/or reasons similar to those documented for the disputed cell search, including trash in Plaintiff's cell and the cell window being covered. (Compl. 13 of 22.) These documents, which are part of the Complaint, demonstrate Plaintiff cannot, on amendment, allege Rivas lacked a legitimate correctional purpose in conducting the disputed cell search. To do so would materially contradict portions of the original Complaint, which Plaintiff cannot disown on amendment. For this reason, Plaintiff's retaliation claim against Rivas is fundamentally flawed and should be dismissed with prejudice and without leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) ("Courts are not required to grant leave to amend if a complaint lacks merit entirely.")

B. Plaintiff Fails to State a Cognizable Eighth Amendment Claim against Rivas.

Plaintiff also appears to be advancing an Eighth Amendment claim in connection with what he characterizes as a punitive cell search by Defendant Rivas. Plaintiff attempts to fortify this claim by alleging he suffered psychological and emotional distress, as well as humiliation in front of other prisoners, in the fact that his cell was searched. (Compl. 5 of 22.) None of these allegations state a cognizable Eighth Amendment claim. In order to state an Eighth Amendment claim related to conditions of confinement in prison, a prisoner-plaintiff generally must allege the unnecessary and wanton infliction of pain. *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976). It is possible that a regime of totally unjustified cell searches, conducted solely for calculated harassment, may be sufficient to state a claim under the Eighth Amendment's cruel and unusual punishment clause. *Hudson v. Palmer*, 468 U.S. 517, 528-530 (1984). But Plaintiff's allegation that a single cell search on December 1, 2006, caused him such grief and suffering as to be intolerable in a civilized society is wholly insufficient to invoke the protections of the Eighth Amendment. *See Hudson*, 468 U.S. at 517 (a single shakedown search did not amount to an Eighth Amendment violation); *Vigliotto v. Terry*, 873 F.2d 1201, 1203 (9th Cir. 1989) (a single cell search does not constitute the unnecessary or wanton infliction of pain).

And once again, Plaintiff's inclusion of the Cell Search Receipt and Cell Search Log make those documents part of his Complaint. *Roth*, 942 F.2d at 625 n.1. Those documents show that 1-- his cell was not searched on December 1, 2006, for the purpose of causing the wanton infliction of pain, but rather for fully legitimate reasons; and 2-- Plaintiff's cell was searched only once that day, and had been searched only four other times in the previous *five months*. (Compl. 13 of 22.) Given these facts, incorporated by reference into the Complaint, Plaintiff cannot, on amendment, allege a regime of insufferable cell searches sufficient to state a cognizable claim under the Eighth Amendment.

As for Plaintiff's complaints about psychological and emotional trauma, and Defendant Rivas's alleged cursing and mocking of him, the law is clear that the use of profanity and threats are part of prison life and culture, and do not rise to the level of a constitutional violation. Even verbal threats by an officer are not actionable as retaliation. *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (prisoner alleged he was "threatened with bodily harm" by the defendants "to convince him to refrain from pursuing legal redress" for alleged beatings). In fact, the Ninth Circuit has specifically held "it trivializes the Eighth amendment to believe a threat constitutes a constitutional wrong." *Gaut*, 810 F.2d at 925. *See Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (verbal harassment alone will not support an action under 42 U.S.C. § 1983); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (prisoner alleged defendant retaliated against him for planning a class action by transferring him to a higher custody status and used vulgar language against him); *see also, Somers v. Thurman*, 109 F.3d 614, 622 n. 5 (9th Cir. 1997), *cert. denied*, 522 U.S. 852 (1997). There is no aspect of Plaintiff's allegations, or the scenario he presents, that is remotely sufficient to state a cognizable Eighth Amendment claim. And because of the documents he has incorporated into his Complaint, any such claim should be dismissed with prejudice and without leave to amend. Further amendment would clearly be futile. *Lopez*, 203 F.3d at 1129.

C. Plaintiff Fails to State a Cognizable Due Process Claim against Rivas.

Plaintiff's Fourteenth Amendment claim, apparently related to his state-issued property that Defendant Rivas allegedly left "strewn throughout the cell," (Compl. 4 of 22), is incognizable. Even if Plaintiff alleged Defendant Rivas confiscated his property unjustly, he would still fail to state a due process claim. This is because an unauthorized deprivation of property by a state employee does not constitute a violation of procedural due process if a meaningful state post-deprivation remedy is available. *Hudson v. Palmer*, 468 U.S.517, 536 (1984). The California Tort Claims Act provides such a remedy. *Barnett v. Centoni*, 31 F.3d 813, 816-817 (1994); *see also* Cal. Gov't Code §§ 810-895. Plaintiff does not and cannot state a valid due process claim in connection with the events he alleges in this lawsuit.

VI.

ALL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AGAINST PLAINTIFF'S CLAIMS

Qualified immunity "'shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The general rule of qualified immunity is intended to provide government officials with the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). A ruling on a qualified immunity claim should be made "at the earliest possible stage in litigation" "so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (citation omitted).

In light of the documents Plaintiff has attached to his Complaint, his allegations are woefully insufficient to show, as is his burden, that Defendant Rivas could have known it was unlawful for her to conduct a search of his prison cell on December 1, 2006, when violations of security and safety regulations were in plain sight, beginning with the obscured cell window. (Compl. 14 of 22.) In fact, Plaintiff's attachments have the opposite effect of showing Rivas's search of his cell was perfectly lawful, which is why all of his claims related to the search must fail. Likewise, even were Plaintiff's allegations against the balance of the Defendants to be considered in spite of his failure to administratively exhaust them, his allegations are totally conclusory in nature and fail to show why those Defendants are not entitled to qualified immunity in their roles of responding to and investigating his inmate appeal against Rivas.

VII.

PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES MUST BE STRICKEN

A motion to strike made under Federal Rule of Civil Procedure 12(f) may be used to strike the prayer for relief where the damages sought are not recoverable as a matter of law. *Tapley v. Lockwood Green Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 n.34 (N.D. Cal. 1996). Based upon the insufficient allegations in Plaintiff's Complaint, Defendants' motion to strike Plaintiff's prayer for punitive damages should be granted.

In *Smith v. Wade*, 461 U.S. 30 (1983), a closely-divided Supreme Court held 5-4 that punitive damages may be awarded in a 42 U.S.C. section 1983 action against a state official in an individual capacity. What is required, however, is a finding that the official's "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to

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the federally protected rights of others." *Id.* at 56. This separate "threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness." *Id.*

It is not enough that a defendant may have acted in an objectively unreasonable manner; his subjective state of mind must be assessed. *Wulf v. City of Wichita*, 883 F.2d 842, 867 (10th Cir. 1989). Where there is no evidence that a section 1983 defendant has acted with evil intent, he is entitled to a directed verdict on this otherwise jury issue. *Ward v. City of San Jose*, 967 F.2d 280, 286 (9th Cir. 1991).

None of the allegations in Plaintiff's Complaint even approach the standard set in *Smith v. Wade*. Nothing in Plaintiff's complaint shows any Defendant acted with the "evil motive or intent," or with "reckless or callous indifference to the federally protected rights of others" necessary to justify Plaintiff's claim for punitive damages. Thus, even if this action is allowed to proceed, this Court should strike Plaintiff's claim for punitive damages as a matter of law because he has failed to allege any facts entitling him to recover them.

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CONCLUSION

For the reasons set forth above, Plaintiff's Complaint should be dismissed, and his request for punitive damages should be stricken. As to any claims against Defendant Rivas which may have been exhausted but which are currently subject to dismissal under Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss those claims with prejudice and without leave to amend. This is because on amendment, Plaintiff cannot state any valid claim against Defendant Rivas under the First, Eighth, or Fourteenth Amendments without materially contradicting the documents he has incorporated into his Complaint. Although Plaintiff is proceeding in *pro se*, the Court is not required to grant leave to amend where it is clear the complaint lacks merit entirely. *Lopez*, 203 F.3d at 1129. The Court should dismiss this lawsuit in its entirety, and should explicitly do so because it is frivolous and fails to state any claim for relief.

Dated: May 16, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rogers, Esau v. Rivas, et al.**

No.: **07-CV-02010 W-JMA**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On May 16, 2008, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND TO STRIKE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Esau Rogers
P-54800
Centinela State Prison
P.O. Box 731
Imperial, CA 92251-0731

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 16, 2008, at San Diego, California.

J. Grand	[signature]
Declarant	Signature

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